U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF TVSI- INC.

DATE: APR. 25, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology services, seeks to employ the Beneficiary as a senior SAP manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

After initially approving the petition on December 19, 2006, the Director, Nebraska Service Center, revoked the petition's approval on March 19, 2015. The Director concluded that the Petitioner willfully concealed the Beneficiary's status as one of its corporate officers on the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification). The Director invalidated the labor certification and found that because the Beneficiary was in a position to influence hiring decisions about the job opportunity, no *bona fide* job opportunity existed.

The matter is now before us on appeal. The Petitioner asserts that it did not misrepresent any material facts and that the Beneficiary was not in position to influence hiring decisions. Upon *de novo* review, the appeal will be dismissed.

I. LAW AND ANALYSIS

A United States employer may sponsor a foreign national for lawful permanent residence, which is a three-part process. First, the U.S. employer must obtain a labor certification, which the U.S. Department of Labor (DOL) processes. *See* 20 C.F.R. § 656 *et seq*. The labor certification states the position's job duties and the position's education, experience and other special requirements along with the required proffered wage and work location(s). The beneficiary states and attests to his or her education and experience. The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(i) of the Act. The DOL's certification affirms that, "there are not sufficient [U.S.] workers who are able, willing, qualified" to perform the position offered where the beneficiary will be employed, and that the employment of such beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *See* Section 212(a)(5)(A)(i) of the Act.

Following labor certification approval, a petitioner files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS) within the required 180 day labor certification validity period. *See* 20 C.F.R. § 656.30(b)(1); 8.C.F.R. § 204.5. USCIS then examines whether: the petitioner can establish its ability to pay the proffered wage, the petition meets the requirements for the requested classification, and the beneficiary has the required education, training, and experience for the position offered. *See* Section 203(b)(3)(A)(ii) of the Act; 8 C.F.R. § 204.5.[1]

As required by statute, the instant petition was accompanied by an approved labor certification which was filed with the DOL on April 15, 2006.

A. The Notice of Intent to Revoke

USCIS may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause for revocation if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

A notice of intent to revoke is issued for good and sufficient cause if the record at the time of the notice's issuance, if unexplained and unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, a petition's approval is properly revoked if the record at the time of the decision, including any explanation and rebuttal evidence submitted by a petitioner, would warrant a petition's denial. *Id.* at 452.

In the instant case, the Director issued a notice of intent to revoke (NOIR) on August 21, 2014. The NOIR informed the Petitioner of evidence that the Beneficiary was one of its corporate officers at the time of the labor certification's filing on April 15, 2006. A copy of the Petitioner's federal income tax return for 2005 identified the Beneficiary by name and Social Security number as an officer who received compensation that year. In addition, corporate documents filed on behalf of the Petitioner in its home state of North Carolina in 2006 and 2010 were signed by the Beneficiary and identified him as vice president. *See* N.C. Dep't of the Sec'y of State, Corps. Div., at

The documents identifying the Beneficiary as an officer of the Petitioner cast doubt on the *bona fides* of the job opportunity. *See* 20 C.F.R. § 656.10(c)(8) (requiring a labor certification employer to certify that "[t]he job opportunity has been and is clearly open to any U.S. worker"). The evidence also suggested that the Petitioner willfully misrepresented the Beneficiary's relationship to it on the accompanying labor certification. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a

[1] In the final step, the beneficiary would file a Form I-485, Application to Register Permanent Residence or Adjust Status, either concurrently with the I-140 petition based on a current priority date, or following approval of an I-140 petition and a current priority date. *See*.8 C.F.R. § 245.

labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification).

Because the record at the time of the NOIR's issuance did not establish the *bona fides* of the job opportunity or the validity of the accompanying labor certification, the Director properly issued the NOIR.

B. Invalidation of the Labor Certification

A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). As previously indicated, USCIS may invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification. 8 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact requires a deliberate and voluntary misrepresentation made with knowledge of its falsity. *Xing Yang Yang v. Holder*, 770 F.3d 294, 303 (4th Cir. 2014). Fraud requires an intention to deceive. *Id.*

In the instant case, the Director found that the Petitioner willfully misrepresented a material fact in its response to Question C.9 on the accompanying ETA Form 9089. Question C. 9 asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner responded: "No."

The record does not support the Director's finding that the Petitioner misrepresented a material fact in its response to Question C.9 on the ETA Form 9089. As previously discussed, the record contains evidence that the Beneficiary was a corporate officer of the Petitioner at the time of the labor certification's filing. However, the record lacks evidence that the Beneficiary had an ownership interest in the Petitioner or a familial relationship with its stockholders, incorporators, or other corporate officers as specified in Question C.9 of the ETA Form 9089.

Because the record does not support the Director's finding that the Petitioner misrepresented a material fact in its response to Question C.9 on the labor certification, we will withdraw that portion of the Director's decision and reinstate the validity of the labor certification.

C. The Bona Fides of the Job Opportunity

As previously indicated, by signing the accompanying labor certification, the Petitioner certified that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). As the Board of Alien Labor Certification Appeals (BALCA) explained in *Matter of Modular Container Systems, Inc.*, the regulation at 20 C.F.R. § 656.10(c)(8) "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." 89-INA-

228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

Id.

We may deny a petition accompanied by a labor certification that does not comply with U.S. Department of Labor regulations. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (upholding a petition's denial where a petitioner did not intend to employ a beneficiary in the area of intended employment stated on the labor certification pursuant to 20 C.F.R. § 656.30(c)(2)).

To determine the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded a company; has an ownership interest in it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated on an accompanying labor certification. *Id.* at *8. We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence and whether the employer complied with DOL regulations and otherwise acted in good faith. *Id.*

Many of the *Modular Container* factors in the instant case indicate the availability of the job opportunity to U.S. workers. As previously discussed, the record does not indicate that the Beneficiary has an ownership interest in the Petitioner or a familial relationship to its principals. The record also does not indicate that he sits on the Petitioner's board of directors, has qualifications matching specialized or unusual job duties, or that his absence would likely cause the company to cease operations.

However, as previously indicated, the record contains evidence that the Beneficiary was a corporate officer of the Petitioner at the time of the labor certification's filing on April 15, 2006. The Petitioner's federal income tax return for 2005, dated May 12, 2006, identifies him by name and Social Security number as an officer of the company who received compensation that year. Copies of the Petitioner's following tax returns through 2014 also identify him as an officer of the company who received compensation.

In addition, corporate documents submitted on the Petitioner's behalf in North Carolina appear to identify the Beneficiary as a corporate officer. Applications for certificates of authority, dated April

3, 2006 and November 10, 2010, as well as an annual report dated November 10, 2010, were signed by the Beneficiary and identify him as vice president.

The Petitioner asserts that the Beneficiary has never served as one of its corporate officers. The Petitioner states that the Beneficiary was promoted to the position of vice president of U.S. operations in 2009. However, it states that his title as vice president is functional in nature and that he has no corporate duties. The Petitioner states that its board of directors never appointed the Beneficiary as a corporate officer and provides copies of the annual reports of its parent company in India to support its statement.

The Petitioner also submitted a letter from its corporate attorney who prepared its tax returns. The letter states that the Beneficiary was listed as a company officer on tax returns "out of an abundance of caution with the Internal Revenue Service for reason that [the Beneficiary] had been given a functional title to handle various administrative duties. But at no time did [the Petitioner] consider this to be an official officer position with [it]."

Despite the Petitioner's explanations for the identifications of the Beneficiary on its federal tax returns and corporate documents, other *Modular Container* facts indicate that the job opportunity was not clearly open to U.S. workers.

The record indicates that the Beneficiary was one of a small group of employees at the time of the labor certification's filing. The Form I-140, Immigrant Petition for Alien Worker, and the accompanying labor certification state the Petitioner's employment of 10 people, although the Petitioner more recently asserts that it employed 12 workers at that time.

The record also indicates the Beneficiary's involvement in recruiting employees for the Petitioner. In email messages between the Beneficiary and the managing director of the Petitioner's parent company in January 2006, January 2008, January 2010, and September 2011, the Beneficiary discussed candidates for employment and their qualifications. The email messages do not indicate that the Beneficiary had authority to hire candidates. However, the messages indicate his involvement in recruitment efforts and suggest his influence in hiring decisions.

The record also indicates that the Beneficiary was the only one of the Petitioner's employees who resided near its office in North Carolina at the time of the labor certification's filing. The Petitioner submitted a list of 12 U.S.-based employees in June 2006. However, the list does not include the employees' locations or roles in the company. *See Matter of Beximco USA, Ltd.*, 90-INA-302, 1991 WL 10348, *4 (BALCA Apr. 15, 1992) (finding that the record reasonably implied that the "contact person" in the U.S. for a labor certification employer had influence in the hiring decision).

The Petitioner asserts that senior managers of its parent company in India oversee recruitment of all its employees and conducted the recruitment for the offered position. The Petitioner provided copies

of offer letters from managers of its parent company to newly hired U.S. employees and a "talent acquisition policy," which outlines the steps taken by the company before hiring an employee.

However, the Petitioner did not provide specific information about the recruitment process for the offered position as requested in our notice of intent to dismiss/request for evidence (NOID/RFE) of November 18, 2015. The Petitioner did not identify the individual employee(s) responsible for the recruitment for the offered position or describe the results of the recruitment. Our NOID/RFE requested copies of materials documenting the recruitment of the offered position during labor certification proceedings, including a recruitment report indicating the number of applicants and the lawful job-related reasons for any rejections. However, the Petitioner stated that it no longer had the materials and did not provide further information about the recruitment results. *See* 20 C.F.R. § 656.10(f) (requiring an employer to retain a copy of a labor certification and supporting documentation for only five years after the filing of an application).

The record indicates that, at the time of the labor certification's filing, the Beneficiary was one of a small group of employees, was actively involved in the Petitioner's recruitment efforts, and was the sole employee at the Petitioner's U.S. office. The record therefore indicates that the Beneficiary was in a position to control or influence the hiring decision of the offered position and that the job opportunity was not clearly open to U.S. workers. We will therefore affirm the Director's decision and dismiss the appeal.

D. The Beneficiary's Qualifying Education

In addition to the deficiencies in the petition noted by the Director, we independently note that the record does not establish the Beneficiary's qualifying education for the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the petition's priority date is April 15, 2006, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states the minimum requirements of the offered position of senior SAP manager as a U.S. master's degree or a foreign equivalent degree in engineering, operations, or information systems, plus 24 months of experience in the job offered.

The Beneficiary attested on the labor certification to his receipt of a master's degree in operations research from the [redacted] India, in 1970. The record contains a copy of a master of arts degree in operational research from the university, stating that the Beneficiary was found qualified for the degree in 1970.

Also, in response to the Director's request for evidence of October 20, 2006, the Petitioner submitted an evaluation of the Beneficiary's foreign educational credentials. The evaluation states that the Beneficiary's master of arts degree is equivalent to 2 years of university studies in the United States. The evaluation concludes that the Beneficiary has the equivalent of a U.S. master of arts degree in international business based on his 1998 certificate in international business from [redacted] in India.

The Beneficiary did not list the 1998 certificate on the labor certification as his highest level of relevant education achieved. In our NOID/RFE, we notified the Petitioner that an official of [redacted] institute told a USCIS officer at the U.S. Embassy in [redacted] India that the certificate was not issued to the Beneficiary. The official said that the institute's record indicates that the "roll number" of the certificate corresponds to another person.

In response to our NOID/RFE, the Petitioner asks us to disregard the Beneficiary's credentials from [redacted] stating that they were submitted "in error." The Petitioner asserts that the Beneficiary's master of arts degree equates to a U.S. master's degree in operations as specified on the accompanying labor certification.

We will disregard the [redacted] certificate as unreliable. Even if the Petitioner established the certificate's authenticity, it would not meet the specifications of the accompanying labor certification. The evaluation submitted by the Petitioner states that the certificate equates to a U.S. master's degree in international business, while the labor certification requires a master's degree in engineering, operations, or information systems.

The remaining evidence of record does not support the Petitioner's assertion that the Beneficiary's Indian master of arts degree equates to a U.S. master's degree. The evaluation submitted by the Petitioner states that the Beneficiary's master of arts degree is equivalent to 2 years of university-level studies in the United States. The evaluation does not indicate that the Indian degree constitutes the foreign equivalent of a U.S. master's degree as specified on the accompanying labor certification.

As indicated in our NOID/RFE, we also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO is a "non-profit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries." *See* AACRAO, http://www4.aacrao.org/centennial/about.htm (accessed April 15, 2016). Federal courts have found EDGE to be a reliable, peer-reviewed source of information about foreign educational equivalencies. *See, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th

Cir. 2014) (holding that USCIS may discount letters and evaluations submitted by a petitioner if they differ from reports in EDGE, which is "a respected source of information").

EDGE reports that a 2-year master of arts degree from India is comparable to a U.S. bachelor's degree. The record therefore does not establish the Beneficiary's possession of a master's degree or a foreign equivalent degree in engineering, operations, or information systems as specified on the accompanying labor certification.

The Petitioner asserts that we should not consult EDGE to determine the Beneficiary's educational qualifications, as EDGE was not fully developed or commercially available when the petition was submitted in 2006.

However, EDGE's unavailability at the time of the petition's filing does not preclude our use of that information. When adjudicating a matter, we may use whatever relevant, reliable, and objective information is available as long as we notify a petitioner of any material, derogatory information and afford it an opportunity to respond. *See* 8 C.F.R. § 103.2(b)(16)(i). Moreover, even if we disregarded the information in EDGE, the record would not establish the Beneficiary's possession of a foreign degree equivalent to a U.S. master's degree. As previously indicated, the evaluation submitted by the Petitioner does not indicate that the Beneficiary's Indian degree constitutes the foreign equivalent of a U.S. master's degree.

For the foregoing reasons, the record does not establish the Beneficiary's educational qualifications for the offered position at the time of the petition's approval. We will therefore also dismiss the appeal on this ground.

II. CONCLUSION

The record does not support the Director's finding that the Petitioner willfully misrepresented a material fact in its response to Question C.9 on the accompanying labor certification. We will therefore withdraw that portion of the Director's decision and reinstate the validity of the accompanying labor certification. However, the record does not establish the *bona fides* of the job opportunity. We will therefore affirm the Director's decision and dismiss the appeal. The record also does not establish the Beneficiary's qualifying education for the offered position.

We will dismiss the appeal for the above stated reasons, with each considered an independent and alternate ground of revocation. As in visa petition proceedings, a petitioner in visa revocation proceedings bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Ho*, 19 I&N Dec. at 489. Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, case number [redacted] is reinstated.

Cite as *Matter of TVSI- Inc.*, ID# 14466 (AAO Apr. 25, 2016)